RPTS MCKENZIE

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MARKUP OF:

H.R. 2655, THE LAWSUIT ABUSE REDUCTION ACT OF 2013

Wednesday, July 17, 2013

House of Representatives,

Subcommittee on the Constitution

and Civil Justice,

Committee on the Judiciary,

Washington, D.C.

The subcommittee met, pursuant to call, at 3:20 p.m., in Room 2141, Rayburn House Office Building, Hon. Trent Franks [chairman of the subcommittee] presiding.

Present: Representatives Franks, Jordan, Chabot, Forbes, DeSantis, Smith, Nadler and Scott.

Staff Present: Paul Taylor, Counsel; Allison Halataei, Parliamentarian; Kelsey Deterding, Clerk; and David Lachmann, Minority Counsel.

Mr. Franks. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the chair is authorized to declare a recess at any time.

Pursuant to notice, I now call up H.R. 2655 for purposes of markup.

The clerk will report the bill.

The Clerk. H.R. 2655, to amend Rule 11 of the Federal Rules of Civil Procedure --

Mr. Franks. Without objection, the bill is considered as read and open for amendment at any point.

[The information follows:]

******** INSERT 1-1 ********

Mr. Franks. I will begin now by recognizing myself and the ranking member for an opening statement.

In order to stop lawsuit abuse, promote jobs and the economy, and restore basic fairness to our civil justice system, rule 11 of the Federal Rules of Civil Procedure must be amended.

Rule 11 provides for one of the most basic requirements for litigation in Federal court, that papers filed with a Federal District Court must be based on both the law and the facts. That is to say at any time a litigant signs a filing in Federal court, they are certifying that to the best of the person's knowledge, information, and belief, the filing is accurate based on the law or reasonable interpretation of the law and is brought for a legitimate purpose. This is a simple requirement but one that both sides to a lawsuit must abide by if we are to have a properly functioning Federal court system.

However, under the current Federal procedure rules, failure to comply with rule 11 does not necessarily result the imposing of sanctions. The fact that litigants can violate rule 11 without penalty significantly reduces the deterrent effect of rule 11. This harms the integrity of the Federal courts and leads to both plaintiffs and defendants being forced to respond to frivolous claims and arguments. The Lawsuit Abuse Reduction Act corrects this law by requiring that Federal District Court judges impose sanctions when rule 11 is violated.

In addition, this legislation will relieve litigants from the financial burden of having to respond to frivolous claims, as the

legislation requires those who violate rule 11 to reimburse the opposing party reasonable expenses incurred as a direct result of that violation. Furthermore, the legislation eliminates rule 11's 21-day safe harbor, which currently gives litigants a free pass to make frivolous claims so long as they withdraw those claims if the opposing side objects.

As Justice Scalia correctly pointed out while dissenting from the 1993 changes to the rule, he said, quote, "Those who file frivolous suits and pleadings should have no safe harbor. Parties will be able to file thoughtless, reckless, and harassing pleadings, secure the in the knowledge that they have nothing to lose. If objection is raised, they can retreat without penalty, " unquote.

Although this legislation makes changes to rule 11, it is important to recognize that nothing in this legislation changes the standard by which courts determine whether a pleading or other filing violates rule 11. Courts will apply the same legal standard they have applied since 1993 to determine if a filing runs afoul of rule 11. Thus, all this legislation really does is to make the technical and conforming changes to rule 11 necessary to make sanctions mandatory rather than discretionary.

According to the Federal Rules of Civil Procedure, the goals of the rule are to ensure that every action proceeded in Federal court must be determined by a, quote, "just, speedy, and inexpensive manner." I believe that this goal is best served through mandatory sanctions for violating the simple requirements of rule 11 that every filing be

based on both the law and the facts. And I urge my colleagues to support the Lawsuit Abuse Reduction Act to restore mandatory sanctions to rule 11.

And I would yield back the balance of my time.

I now recognize the ranking member of our Subcommittee on the Constitution and Civil Justice Mr. Nadler from New York for his opening statement.

[The statement of Mr. Franks follows:]

******** COMMITTEE INSERT ********

Mr. Nadler. Thank you, Mr. Chairman.

Today we revisit legislation supposedly aimed at preventing so-called frivolous litigation but which would in effect in fact revive a rule that while in effect gave birth to an entire litigation industry operating in tandem with normal civil litigation. The revised rule 11 proposed here would take us back to the failed 1983 rule, which the Judicial Conference rightly rejected after a decade of catastrophic experience. Moreover, this legislation goes even beyond the text of the 1983 rule, broadening the flawed mandatory sanctions even further. Worse still, this committee hasn't even made the pretense of considering this very radical change in civil procedure with any care.

The bill was introduced last week, and we are marking it up today with no hearings. I realize that some members may have made up their minds, but there are many new members of the committee who should probably be better informed before we take this up.

The process, or lack of it, here today demonstrates the wisdom of the Rules Enabling Act, in which Congress gave the Judicial Conference the responsibility for reviewing court rules and proposing changes. They have done this job admirably, spending years of careful study through existing rules, how they are functioning, and the implications of any proposed changes. Rule 11 of the Federal Rules of Civil Procedure serves a vital role in maintaining the integrity of our legal system.

As the Rules Committee noted in 1993, quote, "Since the purpose of rule 11 sanctions is to deter rather than to compensate, the rule

provides that if a monetary sanction is imposed, it should ordinarily be paid to the court as a penalty. However, under unusual circumstances, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorneys fees to another party," close quote.

While the sponsor has expressed a desire to limit unnecessary litigation, the experience with the old rule 11 was the exact opposite. Rule 11 litigation became a routine part of civil litigation, affecting one-third of all cases. Rather than serving as a disincentive, the old rule 11, which this bill to a large extent would revive, actually made the system even more litigious and costly. In the decade following the 1983 amendments, there were almost 7,000 reported rule 11 cases, becoming part of approximately one-third of all Federal civil lawsuits. Civil cases routinely became two cases, one on the merits and the other dueling rule 11 complaints. The drain on the courts on the parties' resources caused the Judicial Conference to revisit the rule and adopt the changes that this bill would now have us undue.

In a March 14, 2011, letter to then Chairman Smith and to Ranking Member Conyers, Judge Lee Rosenthal of the United States District Court For the Southern District of Texas and chair of the Committee on Rules of Practice and Procedure and Mark Kravitz, chair of the Advisory Committee on Civil Rules said, quote, "undoing the 1993 rule 11

amendments, even though no serious problem has been brought to the Rules Committee's attention would frustrate the purpose and intent of the Rules Enabling Act. There is no need reinstate the 1983 version of rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committee to not support the proposed legislation amending rule 11," close quote.

When we were considering what became the 2005 amendments to the Bankruptcy Code, the original legislation contained a provision that would have required the imposition of mandatory penalties under bankruptcy rule 9011, the corollary to rule 11. That language was specifically rejected and does not appear in the public law. The court has given the appropriate discretion to craft sanctions as appropriate even though the rest of the legislation stripped the bankruptcy courts of discretion in numerous other areas. Congress thought better of that inflexible, unworkable rule. We were right then, and we should consider this proposal in that same light.

Small businesses, just like all businesses, are concerned about baseless lawsuits. I don't know anyone who wouldn't be. But just to keep the situation in perspective, I would also note that in a June 2008 survey of its members by the National Federation of Independent Business, quote, "the voice of small business," their membership ranked cost and frequency of lawsuits and threatened suits 65th of the top 75 concerns; 36.7 percent responded that was not a problem, with only

7.3 percent called it critical.

Whatever NFIB and Washington may say, I think it is pretty clear that its membership, actual small business people, have some healthy perspective on the issue. In fact, the horror stories we heard at the hearings in previous years on this legislation had nothing to do with rule 11. Most of it involved demand letters, which are not covered by rule 11, and many of them were clearly State court cases. As Judge Rosenthal has pointed out, no serious problems have been brought to the Rules Committee's attention. That is a piece of Texas wisdom we should all heed.

Mr. Chairman, the courts have ample authority to sanction conduct that undermines the integrity of our legal system. But this legislation is the wrong legislation in search of a problem. By taking us back to a time when rule 11 actually promoted routine, costly, and unnecessary litigation, this bill is a cure far worse than a nonexistent disease. We know what this rule does, and the courts rightly rejected it nearly 20 years ago. We should benefit from that experience, not reenact the old rule 11 that caused so much unnecessary litigation. And we should reject this bill. Thank you.

And I yield back the balance of my time.

[The statement of Mr. Nadler follows:]

******** INSERT 1-2 ********

Mr. Franks. Well, thank you Mr. Nadler.

Are there any amendments? Are there any amendments?

Mr. Scott. Mr. Chairman?

Mr. Franks. The gentleman is recognized.

Mr. Scott. I move to strike the last word.

Mr. Franks. The gentleman is recognized for 5 minutes.

Mr. Scott. Thank you, Mr. Chairman.

I won't take the 5 minutes. I just wanted to point out that these mandatory sanctions have the same problems as mandatory minimums. Generally, the "one size fits all" violates common sense. A technical violation, that common sense would suggest a warning as the appropriate sanction, would result in satellite litigation over starting with the reasonableness of attorney's fees. We are trying to cure a problem that doesn't exist. In fact, we are reinstating, as the gentleman from New York pointed out, we are reinstating the problem that was there. I hope we defeat the bill.

I yield back.

Mr. Franks. I thank the gentleman.

A reporting quorum being present, the question is on reporting the bill favorably to the full committee.

Those in favor please say aye.

Those opposed, no.

The ayes have it.

Mr. Nadler. Mr. Chairman, a recorded vote, please.

Mr. Franks. A recorded vote has been requested. And the clerk

will call the roll.

The Clerk. Mr. Franks?

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Jordan?

Mr. Jordan. Yes.

The Clerk. Mr. Jordan votes aye.

Mr. Chabot?

Mr. Chabot. Aye.

The Clerk. Mr. Chabot votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

Mr. King?

[No response.]

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. DeSantis?

Mr. DeSantis. Aye.

The Clerk. Mr. DeSantis votes aye.

Mr. Smith of Missouri?

Mr. Smith. Aye.

The Clerk. Mr. Smith of Missouri votes aye.

Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

Mr. Conyers?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Cohen?

[No response.]

The Clerk. Mr. Deutch?

[No response.]

Mr. Franks. The clerk will report.

The Clerk. Mr. Chairman, six members voted aye; two members voted nay.

Mr. Franks. The ayes have it, and the bill is reported favorably to the full committee.

This concludes our business for the day. And I want to thank all of our members for attending.

The meeting is adjourned.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]